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A PLEA FOR STRAIGHT THINKING CONCERNING THE ENFORCEMENT OF LAWS AS THEY EXIST.

IT has become an increasingly prevalent fashion of late for the lay world to criticize our bench and bar. Such criticism is usually based upon the broad claim that our legal system, as now administered, fails to "do justice." Often the basis of censure is the refusal of the courts to construe acts of the legislatures as the lay world in general, or the executive or legislative branches of the government, desire and think proper. We have recently had some notable instances of criticism on this score. A still further ground of detraction has been found in the judgments of our courts condemning certain legislative acts as contravening the constitutional limitations. Such judgments have aroused great hostility where the proscribed legislation had its origin in a wave of strong popular opinion. Or a particular cause, which attracts wide public attention, calls down upon the court passing judgment therein a tremendous "hue and cry" because of the "unjust result" reached, as the populace regard it.

In view of this critical tendency it is important to consider again the nature and origin of our legal system, to the end that we may ascertain whether these criticisms are well founded or baseless.

The optimism of humanity reveals itself in men's adherence to the ideals they have created, even though such ideals are proven impossible of present attainment. When it becomes evident that these ideals are not being realized, we are often perturbed and denunciatory. It is well, too, that we cling pertinaciously to those things which seem desirable to us, for out of our longing and struggling come the great reforms of the world. One great evil, however, results from confusing the ideal with practical and existing conditions — men are unable accurately to measure and judge the motives and conduct of those about them.

Nowhere is this more evident than in the realm of the law. The lofty ideal in our hearts is that of justice. When we find our system of legal and equitable rights and remedies failing to accomplish the desired result, we are prone to attribute many base

motives to the judges and lawyers who administer it. We say: "The object of our laws is justice. When justice does not result, some one has been guilty of a wrong. It must be the lawyers or the judges who have sinned, as they are charged with the administration of the laws." Or, again, when some popular reform has found expression in an act of the legislature and the courts have pronounced it ineffectual to accomplish the object sought, either by reason of faulty expression or on account of some constitutional inhibition, the people say: "Our reform is just and right; the courts and lawyers are aiding injustice when they declare the reform measure to be invalid."

It behooves us, however, to examine these conclusions. Does it follow that our courts and lawyers are performing their duties badly if what we regard as justice at the moment fails to result from the decisions of our courts and the applications of our rules of law? There can be no doubt that such is the *desideratum* — our ideal, in other words; but is it the fact? To get our answer it is necessary to consider the foundation upon which our legal structure is based.

It seems clear that the structure is entirely artificial. We may grant that our laws owe their origin to the innate longing of mankind for justice. But we then have to define "justice," and history shows us that this is a most elastic term. It certainly meant to our good Puritan forefathers something very different from what it does to us, and yet neither their nor our motives are to be impugned. There is no escape from the conclusion that our laws have sprung into being from wholly artificial agreements or rules as to conduct. In the beginning "might made right." If one had found a bright pebble which his neighbor wanted, the latter took it if he could. Eventually a rule was adopted that strength should not be the criterion, but that prior possession should settle the matter. Then arose a controversy as to what should be deemed to constitute prior possession, and a regulation was adopted to cover that point. Next came the question of what should happen to the pebble if the possessor died, and a rule was formulated on this subject.

In process of time the two men became hundreds and the hundreds thousands, and the questions for solution well-nigh innumerable. Then the informal compacts or rules necessarily became "laws."

They were none the less artificial, however. The right of the

Biblical patriarchs to the undisturbed possession of several wives, as well as our more circumscribed claim to one, rested and rests only upon the obligation of the other members of society to respect such right and claim. In other words, it was recognized that the peaceable association of men in groups required some fixed and dependable regulation or adjustment of their conflicting interests, and that any such regulation or adjustment had to be created, out of whole cloth, as it were, by an agreement or rule of conduct which would effect the desired result. We are pleased to say often that this or that "right" is founded upon "abstract justice," but this only means that all men have concurred in the establishment of the rule which creates the "right," without dissent. For example, men have uniformly agreed for many centuries that their conflicting interests can be best harmonized by allowing the finder of the pebble to keep it as against the desire of his stronger fellow to take it away. But this does not mean that the finder has any inherent "right" to it; it only shows that there has been no difference of opinion as to the best form of adjustment.

After a time another difficulty presented itself: there appeared two men, each claiming to be the prior possessor of the pebble. How was the question to be determined? The answer to this query necessitated an amplification of the prior conventions. After such elaboration the compact or law was no longer that the prior possessor should have the pebble, but that he who *proved* prior possession should be entitled to it. Out of the difficulties which presented themselves in connection with this proof, the rule became more and more involved; the right to the pebble came to depend not only upon proof of the prior possession, but upon proof of a certain kind or character, by certain persons or documents and before a given court or body of men.

It is not material to our present discussion to consider how these conventions or rules came into being, or how they gained the force of authority as law — whether the "Social Compact" theory of Locke accounts for them, whether mere custom is sufficient to explain their origin, or whether they grew up in some other way. It is a matter of indifference here, whether they were voluntarily assented to by all the members of the political body or whether the assent of some of them was compelled through the superior force of others. The essential fact is that, in some way or other, these rules of conduct came to be assented to and acquired controlling force.

Thus, our "rights" are only the creatures of these compacts or rules of conduct. We have a "right" because a particular item of the conventions or laws limits the action of the rest of the world in connection with the subject. In the very nature of things, these "rights" must be as artificial as the society out of which the compact or laws have sprung. The agreed rules of conduct which govern our correlative "rights" and "duties" and which find their definition in our laws, are of no different origin and character from those controlling the less important matters of purely social intercourse. No one can doubt the entire artificiality of the convention that men shall wear trousers instead of skirts. And there should be no less uncertainty as to the character of our laws' foundation. In a word, our laws, like our social customs, are only the self-imposed rules of the game we have agreed to play.

The players of what we ordinarily consider a game expect to abide by the rules they have agreed to for the government of the play under all circumstances. If such rules provide for a penalty when certain things occur, no one can object to the imposition of the penalty when the agreed facts arise. Of course, there may be laudable feelings of generosity on the part of any player which prompt him to waive the advantage the agreed penalty gives him; but no one has any just cause for complaint, so far as concerns the rules themselves, if his fellow stands on the rules agreed to by all the players and demands an exact compliance with them. The converse of the proposition is true, too. No one can demand the penalty unless all the stipulated circumstances occur. It is only when they exist that the penalty can be exacted.

The same is true in the more serious "game," for the regulation of which our laws are designed. Every one is entitled to shape his conduct on the exact rules agreed to by himself and his fellows through their association in the body politic which has formulated the rules into "laws." I say "entitled": naturally, many follow the higher ideal, and refuse to take advantage of the letter of the law when it seems to work unjustly. But of that later. The point now is that, under the rules of the body politic heretofore formulated into "laws," every man has the right to insist that no one shall demand anything more of him than precise compliance with the agreement and that he shall be subjected to no pains and penalties other than those "nominated in the bond."

When we translate these generalities into particularities in the realm of the administration of our laws by the courts, we find the

layman aghast. When he is told that it is the absolute right of a man who has deliberately broken his contract to be immune from any penalty therefor until the fact of the breach and the *quantum* of damages sustained thereby have been established in a certain tribunal, by certain kinds of proof and with a reasonable degree of certainty, the natural rebellion against the failure of the ideal causes a vigorous expression of dissatisfaction. When it is made clear to him that the guiltiest murderer is entitled to insist upon the state's attorney proving his guilt beyond a reasonable doubt according to well-established rules of evidence before his life can be taken as punishment for the crime, he is even more rebellious against the conditions which prevail. Why? Solely and simply because he has failed to realize that our laws are the " rules of the game " of our political and social life, and because he has neglected to acquire an accurate knowledge of such rules.

If he had such realization and knowledge, he would not attribute improper motives to the judge and lawyer who cooperate in securing a fair trial to the murderer or contract-breaker. He would see that they were simply keeping the oath they each had taken, to do as much as in them lay to secure the proper administration of the laws of the land. The legally trained mind cannot escape the fundamental idea, acquired all through the professional training, that the law is the agreed rule of conduct, and is to be administered *as it exists*, without any respect for persons, whether *pro* or *con*. Where it gives an advantage of some sort to a man who, viewing the matter from our highest ideals of justice, ought not to have such advantage, it is, nevertheless, to be followed and administered. It is a rule of the game to which we have all agreed in advance, and no one should be heard to say that it is not to be regarded as binding. Indeed, our ideal of justice prompts us to declare that it would be grossly improper to change any of the prearranged rules after the event. If it were suddenly agreed by three of the four players at a game of bridge that, in order to " work justice " in a certain hand which had been played and in which one or more of the players had " revoked," the established rule requiring one to follow suit was to be regarded as abolished in determining who had won the odd trick, we all would agree, I think, in deeming the fourth man sorely aggrieved. Yet there is no difference in principle between such a case and a refusal to administer our laws impartially where they seem to work injustice. And the lawyer and judge who assist the most abandoned criminal

in getting whatever "rights" he has under the laws as they exist, ought not to be the target of the unthinking attack which so often gains well-nigh universal assent and approbation.

So far as his individual conscience goes, he is only doing what he swore he would do when he ascended the bench or was admitted to the bar. Is he to be condemned for doing that? But, our earnest layman objects, he is furthering injustice. Is he, though? Let us consider that for a moment.

We have already agreed that our standard of justice is an ever-varying one, with vast differences of opinion on the subject. But let us assume that, in the particular case under consideration, we all would declare, with one accord, that the result which a rigid administration of the existing law requires, *does* effect an undesirable result. Can it be said that, even on such an assumption, the lawyer or judge is "furthering injustice" if he adheres strictly to the law as it is, and either succeeds in bringing about such result, or (in the case of the judge) directs it? *Ex hypothesi*, he does in the particular case, but his horizon ought to be much larger than that. He ought to consider what will be the effect of any departure from the established rule of conduct on those who are striving to shape their life in accordance with such rule. If the rule is departed from once, to work what the individual lawyer or judge or even all the world regards as justice in a particular case, is there any reason why we shall not assume that there will be another departure from it; and, if so, will it not be more radical than its predecessor?

The truest and broadest justice consists in the unswerving administration of the rules of the game as we have agreed upon them. We each may suffer at times because our limited human brains have not formulated the rule in a shape sufficiently comprehensive to effectuate our object. Then let us modify the rule in respect of our future conduct; but we ought not to seek to evade the rule we have agreed upon so far as it affects past matters. Where there is any such evasion, the grossest injustice results because of the inability of any member of the community to govern his conduct according to any rule. He does not know what the rule is, or, rather, what it will be declared to be.

In our strivings toward the attainment of the idealistic justice we have in our hearts, centuries ago we set up a "keeper of the king's conscience." It was to be his duty and prerogative to ameliorate the rigid and unswerving administration of the fixed "rules of the

game," where the king, in his capacity of a beneficent *parens patriae*, could see that injustice would result from a judgment in accordance with those rules. This chancellor was to decide disputes "according to natural justice and equity." He was to be bound by no hard and fast rules. In short, he was to be the embodiment of our cherished ideal of justice. Nothing has ever demonstrated the impossibility of attaining this ideal — at least while human nature is as frail and fallible as it has been up to this time — so conclusively as the history of the development of this "keeper of the king's conscience." Beginning with no fixed rules governing his administration of the "king's conscience," except that of doing "natural justice and equity," at the present time we find this "conscience" as entirely controlled by rule and rote as the courts of law. While the rules applicable in a court of equity (as the court of the chancellor has come to be called), differ somewhat in substance from those governing a court of law, there is not a shadow of distinction in respect of the rigidity of the rules. Equity has become as ossified as the law. A learned judge has recently expressed this most forcefully; he says:

"Courts of equity act on fixed principles, and in this respect their authority is no more to be arbitrarily exercised than is the authority of courts of law. These principles emanate from natural or intuitive justice, and are necessarily of general application, to which particular cases must be made to conform. A court of equity, therefore, must move within these principles and adhere to them, lest the condition of the law be one of uncertainty and chaos, whereby those desirous of conducting themselves according to law are prevented from knowing what the law is and of regulating their affairs by its demands and commands."

Another jurist says:

"While some courts, in the eager desire for justice, have carried their rules quite far . . . , there is often great danger of forgetting that there is virtue and truth in the maxim that 'Hard cases are the quicksands of the law.' There is, in all such instances, great danger of the courts drifting entirely away from the fundamental grounds upon which a rule of equity is builded, and getting out upon the wide sea of adventure without chart or compass. While rules and principles of equity jurisprudence are constantly expanding, in the aspiration for justice in the administration of law by the courts, they should never forget that 'the sprout is to savour of the root and go the same way.'"

It would seem, therefore, that the very structure of our society and body politic drives us, even against our will, back to the precisely formulated and rigidly administered "rule of the game." Up to this time our ingenuity has not been able to devise a means of working toward our ideal of justice in any other way. And no one has been able to suggest any other mode of procedure which seems better adapted to our end.

The logical course is to accept the situation and work toward our goal along the path apparently marked out for us. Let us realize that the agreed rule is to be the rule under any and all circumstances, and that the exact application of it, even where it works what seems to us injustice in a given case, is the course best adapted to the attainment of our ideal because it will drive us to such a modification or restatement of the rule as will embody in it the elements necessary to accomplish the justice we seek in all cases. The course of some judges, in seeking to stretch the rule so as to prevent what they regard as an unjust result in any given case, is thus, in the long run, most injurious: it precludes exact knowledge of what the rule is; if the rule is inartificially or inadequately formulated, it retards the process of reformation. It has produced more injustice than all the "hard cases" since the world began, because of the confusion and uncertainty it has injected into our system. The sagacious person, seeking antecedently to make his conduct conform to the rule, is unable to do so because he cannot ascertain what the rule is. As a result, despite all his care and desire to act properly, he is adjudged to have contravened the rule. Surely, no injustice is equal to this!

Respect for the rules as they have been established, and the duty to assist in their exact execution do not, however, in any degree suspend or modify the higher law, "to deal justly." Above all the rules of conduct which we have framed for our governance in the political or social body, is the requirement that a man shall "to his own self be true." When the individual conscience dictates a certain line of conduct which involves the relinquishment of a "right" given under the law, nothing in this article is intended to intimate that the "right" ought to be insisted upon. But that is a matter of individual conscience — of what a man requires of himself. It does not involve compulsion by his fellows.

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